SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 295

FLORENCE SAMUELS LANDRESS, PETITIONER,

vs.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY AND TRAVELERS INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Original	Print
Record from district court of the United States, Eastern Tennessee	1	1
Stipulation as to record on appeal	1	1
Declaration, No. 1804	2	2
Declaration, No. 1805	6	6
Motion to make third count more specific, No. 1804	9	9
Motion to make third count more specific, No. 1805	9	9
Demurrer, No. 1804	10	10
Demurrer, No. 1805	12	12
Motion to amend motion with respect to third count and memorandum in support, No. 1804	14	14
Motion to amend motion with respect to third count and memorandum in support, No. 1805	15	14
Order of consolidation	16	15
Final judgment	16	15
Plaintiff's exception	18	17
Memorandum opinion, Taylor, J	18	17
Petition for appeal	22	21
Assignment of errors	23	21
Order granting appeal	25	23
Citation and service (omitted in printing)	25	
Clerk's certificate (omitted in printing)	26	
Proceedings in United States circuit court of appeals, sixth circuit	27	24
Minute entry of argument and submission	27	24
Judgment	27	24
Opinion, Hicks, J	28	25
Clerk's certificate	31	28
Order allowing certiorari	32	29

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[fols. a & 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE EASTERN DISTRICT OF TENNESSEE

At Law. No. 1804

FLORENCE SAMUELS LANDRESS

vs.

PHŒNIX MUTUAL LIFE INSURANCE CO.

and At Law. No. 1805

FLORENCE SAMUELS LANDRESS

vs.

TRAVELERS INSURANCE COMPANY

Consolidated Causes

STIPULATION AS TO RECORD ON APPEAL

I

The transcript of the records in the State Court, except such parts thereof as are hereinafter called for, need not be included in the transcript of the record on appeal, it being agreed that each of the above suits was commenced in the Circuit Court of Hamilton County, Tennessee, and, the plaintiff being a citizen of the State of Tennessee residing in the Southern Division of the Eastern District of Tennessee and the defendant a citizen of a State of the United States other than the State of Tennessee, was, on a petition duly filed, properly removed to the United States District Court for the Southern Division of the Eastern District of Tennessee.

II

The transcript of the record on appeal shall consist of the following:

(1) This stipulation.
(2) The declaration in each of the consolidated cases.
(3) The motion in each case to make the third count more specific.
(4) The demurrer in each case.
[fol. 2] (The exhibits to the demurrers will not be copied but will be sent up without copying.)
(5) The motion in each case to amend the motion with respect to the third count.
(6) Order consolidating the two cases.
(7) Final judgment entered in consolidated causes.
(8) Plaintiff's exception filed in the consolidated causes.
(9) Memorandum opinion of Judge Taylor.
(10) Petition for appeal and assignment of errors.
(11) Order granting appeal.
(12) Citation.

William L. Frierson, Atty. for Plaintiff. Vaughn Miller, Atty. for Defendant Phœnix Mutual Life Insurance Company. J. F. Finley, Atty. for Defendant Travelers Insurance Company.

IN UNITED STATES DISTRICT COURT

DECLARATION IN No. 1804—Filed in State Court November 29, 1930

The plaintiff, Florence Samuels Landress, sues the defendant, in court by service of process, for $20,000.00 due her on two certain policies of insurance on the life of her husband, Thos. L. Landress, and for cause of action, says:

First Count

(1) Plaintiff is the widow of Thos. L. Landress, who died August 5, 1930. At the time of his death there were in full force and effect two certain policies of insurance issued by defendant under its numbers 381,932 and 522,049, re- [fol. 3] spectively, which policies are here to the Court shown. By the terms of said policies, the defendant in consideration of the premiums paid, agreed and bound itself to pay the plaintiff the sums of $10,000.00 and $5,000.00 respectively, upon receipt at its home office of due proofs of

the death of the said Thos. L. Landress, and further agreed to pay the plaintiff as double indemnity the additional sums of $10,000.00 and $5,000.00 respectively upon receipt of due proofs that said death resulted directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental causes, and not directly or indirectly, wholly or partly from disease, or physical or mental infirmity.

(2) After the death of her said husband, plaintiff furnished defendant at its home office due proofs of death on blanks furnished by it showing that said death had occurred under the circumstances hereinafter stated, and demanded of defendant the double indemnity. Defendant accepted said proofs of death without objection, and has paid without prejudice to plaintiff's rights the amount that would have been due on said policies if said death had not been accidental within the meaning of said policies, but has refused and declined to pay the double indemnity. Said refusal was not in good faith within the meaning of the Tennessee statute imposing a penalty for refusal to pay, and as a result, plaintiff has been forced to bring this action and is entitled to recover damages at least to the extent of the reasonable fees of her attorneys in this case.

(3) The death of plaintiff's said husband occurred under the following circumstances. He was accustomed to play and did frequently play golf in the afternoon during the summer months. On the afternoon of August 5, 1930, he was in his usual good health and not suffering from any disease or any mental or physical infirmity, and was playing golf as he often did when the weather was such as it was on that day, and as many others did without injury on the afternoon and on the same golf links. But while so playing, he was suddenly and unexpectedly overcome by the force of the sun's rays upon his head and body and died within an hour or two. An autopsy revealed that there was no bodily infirmity or disease which could have been a contributing cause of his death.

(4) Wherefore, plaintiff says that the death of her said husband resulted directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental causes, and not directly or in- [fol. 4] directly, wholly or partly from disease or from

physical or mental infirmity, and that the defendant is indebted to her in the sum of $15,000.00 with interest from August 5, 1930, together with a penalty of 25% thereof. And she sues for the sum of $20,000.00 and demands a jury to try the issues when made up.

Williams & Frierson, Attorneys.

Second Count

Plaintiff sues the defendant for another $20,000.00 and for cause of action reiterates and adopts the allegations of paragraphs (1), (2) and (3) of the first count thereof, and says further:

At the time plaintiff's said husband received the bodily injury which resulted in his death, he was engaging in his accustomed recreation in which he and thousands of others constantly engaged without injury even on hot days, and the injury which followed was not the ordinary, natural or reasonably to be expected result of playing golf. Plaintiff's husband was playing golf unconscious of any danger from the heat of the sun, and the injury which resulted in his death was not one which followed in a not unusual or unexpected way from any intentional act of his. It did not happen according to the usual course of things or as expected.

Wherefore, plaintiff says that the death of her said husband resulted directly and independently of all other causes from bodily injuries effected through external, violent, and accidental causes not directly or indirectly, wholly or partly from disease or from physical or mental infirmity, and that the defendant is indebted to her in the sum of $15,000,00 with interest from August 5, 1930, together with a penalty of 25% thereof, and she sues as aforesaid and demands a jury to try the issues when made up.

Williams & Frierson, Attys.

Third Count

Plaintiff sues the defendant for another $20,000.00 and for cause of action reiterates and adopts the allegations of Paragraphs (1), (2) and (3) of the first count hereof, and says further:

'At the time plaintiff's said husband received the injury which resulted in his death, there was, but unknown to him, a temporary disorder or condition in his body, not amount-

ing to a mental or physical infirmity within the meaning [fol. 5] of the policies, which for the time being rendered him more than ordinarily sensitive to the heat of the sun. This temporary and unknown condition intervened between his intentional act in playing golf, which he intended and expected to perform safely and which others did perform safely at the same time and place, and the injury which followed.

Wherefore, plaintiff says that the death of her said husband resulted directly and independently of all other causes from bodily injuries effected through external, violent and accidental causes not directly or indirectly, wholly or partly from disease, or from physical or mental infirmity, and that the defendant is indebted to her in the sum of $15,000.00, with interest from August 5, 1930, together with a penalty of 25% thereof, and she sues as aforesaid and demands a jury to try the issues when made up.

Williams & Frierson, Attorneys.

Fourth Count

Plaintiff sues the defendant for another $20,000.00 and for cause of action reiterates and adopts the allegations of Paragraphs (1), (2) and (3) of the first count hereof, and says further:

Accidents do sometimes happen to those playing golf, but are not the usual and ordinary incidents of that game, and the double indemnity provisions of said policies do not exclude the risks incident to playing golf. It was only by chance that on the day in question plaintiff's husband happened to be the one out of the many playing with whom the rays of the sun came in contact in such a way as to cause injury.

Wherefore, plaintiff says that the death of her said husband resulted directly and independently of all other causes from bodily injuries effected through external, violent and accidental causes not directly or indirectly, wholly or partly from disease, or from physical or mental infirmity, and that the defendant is indebted to her in the sum of $15,000.00 with interest from August 5, 1930, together with a penalty of 25% thereof, and she sues as aforesaid and demands a jury to try the issues when made up.

Williams & Frierson, Attys.

[fol. 6] IN UNITED STATES DISTRICT COURT

DECLARATION No. 1805—Filed in State Court November 29, 1930

The plaintiff, Florence Samuels Landress, sues the defendant, in court by service of process, for $14,000.00 due her on a certain policy of accident insurance issued by the defendant to her husband, Thos. L. Landress, and for cause of actions says:

First Count

(1) Plaintiff is the widow of Thos. L. Landress, who died August 5, 1930. At the time of his death there was in full force and effect a certain policy of insurance issued by defendant under its number MD-39182, which policy is here to the court shown. By the terms of said policy the defendant, in consideration of the premiums paid, agreed and bound itself to pay to the plaintiff the sum of $10,000.00, upon the receipt by defendant of proofs of the death of her said husband within ninety days after his death, in the event his death should result from bodily injuries effected directly and independently of all other causes, through external, violent and accidental means.

(2) Upon the death of her said husband, plaintiff caused immediate notice to be given the defendant and within ninety days after said death furnished it with due proofs of death, on blanks furnished by it, showing that said death had occurred under the circumstances hereinafter stated, and demanded payment of said $10,000.00. Defendant accepted said proofs of death without objection but has refused and declined to pay said $10,000.00 or any part thereof. Said refusal to pay was not in good faith within the meaning of the Tennessee statute imposing a penalty for refusal to pay, and, as a result, plaintiff has been forced to bring this action and is entitled to recover damages at least to the extent of the reasonable fees of her attorneys in this case.

(3) The death of plaintiff's said husband occurred under the following circumstances: He was accustomed to play and did frequently play golf in the afternoon during the summer months. On the afternoon of August 5, 1930, he was in his usual good health and not suffering from any

disease or any mental or physical infirmity and was playing golf as he often did, when the weather was such as it was on that day, and as many others did without injury on the same afternoon and on the same golf links. But while [fol. 7] so playing he was suddenly and unexpectedly overcome by the force of the sun's rays upon his head and body and died within an hour or two.

(4) Wherefore plaintiff says that the death of her said husband resulted directly and independently of all other causes from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means and that the defendant is indebted to her in the sum of $10,000.00 with interest from August 5, 1930, together with a penalty of 25% thereof. And she sues for the sum of $14,000.00 and demands a jury to try the issues when made up.

Williams & Frierson, Attys.

Second Count

Plaintiff sues the defendant for another $14,000.00 and for cause of action, reiterates and adopts the allegations set out in Paragraphs (1), (2) and (3) of the first count hereof, and says further:

At the time her said husband received the bodily injury which resulted in his death, he was engaging in his accustomed recreation in which he and thousands of others constantly engaged without injury even on hot days, and the injury which followed was not the ordinary, natural or reasonably to be expected result of playing golf. Plaintiff's husband was playing golf unconscious of any danger from the heat of the sun, and the injury which resulted in his death was not one which followed in a not unusual or unexpected way from any intentional act of his. It did not happen according to the usual course of things or as expected.

Wherefore, plaintiff says that the death of her said husband resulted directly and independently of all other causes, through external, violent and accidental means and that the defendant is indebted to her in the sum of $10,000.00 with interest from August 5, 1930, together with a penalty of 25% thereof. And she sues for the sum of $14,000.00 and demands a jury to try the issues when made up.

Williams & Frierson, Attorneys.

Third Count

Plaintiff sues the defendant for another $14,000.00 and for cause of action reiterates and adopts the allegations of [fol. 8] Paragraphs (1), (2) and (3) of the first count hereof, and says further:

At the time plaintiff's said husband received the injury which resulted in his death, there was, but unknown to him, a temporary disorder or condition in his body, not amounting to a mental or physical infirmity within the meaning of the policy, which for the time being rendered him more than ordinarily sensitive to the heat of the sun. This temporary and unknown condition intervened between his intentional act in playing golf, which he intended and expected to perform safely and which others did perform safely at the same time and place, and the injury which followed.

Wherefore, plaintiff says that the death of her said husband resulted directly or independently of all other causes from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means and that the defendant is indebted to her in the sum of $10,000.00 with interest from August 5, 1930, together with a penalty of 25% thereof, and she sues for the sum of $14,000.00 and demands a jury to try the issues when made up.

Williams & Frierson, Attorneys.

Fourth Count

Plaintiff sues the defendant for another $14,000.00 and for cause of action reiterates and adopts the allegations of Paragraphs (1), (2) and (3) of the first count hereof, and says further:

Accidents do sometimes happen to those playing golf, but are not the usual and ordinary incidents of that game, and said policy does not exclude the risks incident to playing golf. It was only by chance that, on the day in question, plaintiff's husband happened to be the one, out of the many playing, with whom the rays of the sun came in contact in such a way as to cause injury.

Wherefore, plaintiff says that the death of her said husband resulted directly and independently of all other causes from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means and that the defendant is indebted to her in the sum

of $10,000.00 with interest from August 5, 1930, together with a penalty of 25% thereof, and she sues for the sum of $14,000.00 and demands a jury to try the issues when made up.

Williams & Frierson, Attorneys.

[fol. 9] IN UNITED STATES DISTRICT COURT

MOTION TO MAKE THIRD COUNT MORE SPECIFIC—Filed in No. 1804, January 23, 1931

Defendant moves for an order requiring plaintiff to make the third count of her declaration more specific with respect to the allegations in the second paragraph thereof touching the alleged "temporary disorder or condition" of assured's body, by specifying:

(a) The nature, character and extent of such temporary disorder or condition;

(b) The portion or portions of assured's body affected by such temporary disorder or condition;

(c) The reason or reasons why such temporary disorder or condition are claimed to have rendered assured more than ordinarily sensitive to the heat of the sun.

Miller, Miller & Martin, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

MOTION TO MAKE THIRD COUNT MORE SPECIFIC—Filed in No. 1805, January 23, 1931

Defendant moves for an order requiring plaintiff to make the third count of her declaration more specific with respect to the allegations in the second paragraph thereof touching the alleged "temporary disorder or condition" of assured's body, by specifying (a) the nature, character and extent of such temporary disorder or condition, (b) the portion or portions of assured's body affected by such temporary disorder or condition, and (c) the reason or reasons why such temporary disorder or condition are claimed

to have rendered assured more than ordinarily sensitive to the heat of the sun.

Finlay & Campbell, Attorneys for Defendant.

[fol. 10] IN UNITED STATES DISTRICT COURT

DEMURRER IN No. 1804—Filed January 23, 1931

Defendant demands oyer of the policies of insurance mentioned in the declaration, and the same being read to defendant as follows (the copies of said policies which are hereto attached, and marked Exhibits "A" and "B," respectively, are hereby made a part hereof as fully as if here copied), defendant demurs to the first, second and fourth counts of the declaration because it appears on the face thereof that—

I

The action is to recover the double indemnity benefit payable under the policies only in event insured's death resulted "directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental causes," whereas this insured's death did not result "directly and independently of all other causes from bodily injuries effected solely through external, volent and accidental causes."

II

The policies provide that said double indemnity benefit shall not be payable if insured's death resulted "directly or indirectly, wholly or partly, from physical or mental infirmity * * * or from * * * disease," whereas this insured's death did result "directly or indirectly, wholly or partly, from physical or mental infirmity * * * or from * * * disease."

III

Insured's death did not result from bodily injuries.

IV

Insured's death did not result from bodily injuries effected solely through external and/or violent and/or accidental causes.

V

If insured's death resulted from bodily injuries, within the meaning of the provision in question, the cause or causes that produced such bodily injuries were not external and/or accidental.

[fol. 11]

VI

The external cause or causes, if any, resulting in insured's death were not accidental within the meaning of the provision in question.

VII

The external cause or causes, if any, resulting in insured's death were his voluntary acts, intentionally performed in subjecting himself to the heat of the sun and in his physical exertions incident to playing golf under external physical circumstances known to insured, wherefore such cause or causes were not accidental within the meaning of the provision in question.

VIII

Nothing was done, happened or occurred, except insured's resulting illness and death, that was not planned and foreseen by insured, wherefore his death did not result from any cause or causes that were both external and accidental.

IX

While doing exactly what he intended to do, in the exact manner in which he intended to do it, insured simply exposed himself to the heat longer than his body could endure, wherefore if his death resulted from any external cause or causes, such external cause or causes were not accidental within the meaning of the provision in question.

X

In so far as insured's death resulted from the causes alleged, it resulted from means voluntarily employed in a not unusual or unexpected way; in the acts or occurrences preceding the alleged injury nothing unforeseen, unexpected or unusual occurred which produced it; wherefore the alleged injury did not result through accidental causes.

Miller, Miller & Martin, Attorneys for Defendant.

[fol. 12] IN UNITED STATES DISTRICT COURT

DEMURRER IN No. 1805—Filed January 23, 1931

Defendant demands oyer of the policy of insurance mentioned in the declaration, and it being read to defendant as follows: (The copy of said policy, which is hereto attached and marked Exhibit "A," is hereby made a part hereof as fully as if here copied), defendant demurs to the first, second and fourth counts of the declaration because each of said counts shows on its face that:

I

The action is to recover the sum payable under the policy only in the event insured's death resulted "from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means," whereas this insured's death did not result "from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means."

II

The policy provides for insurance "against loss resulting from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means," whereas this insured's death did not result "from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means."

III

The benefit under the policy is not payable if insured's death resulted directly or indirectly, wholly or partly from physical or mental infirmity or disease, whereas this insured's death did result directly or indirectly, wholly or partly from physical or mental infirmity or disease.

IV

Insured's death did not result from bodily injuries.

V

Insured's death did not result from bodily injuries effected solely through external and/or violent and/or accidental means.

VI

If insured's death resulted from bodily injuries within the meaning of the provision in question, the means that produced such bodily injuries were not external and/or accidental.

[fol. 13]

VII

The external means, if any, resulting in insured's death were not accidental within the meaning of the provision of the policy in question.

VIII

The external means, if any, resulting in insured's death were his voluntary acts, intentionally performed, in subjecting himself to the heat of the sun, and in his physical exertions incident to playing golf under external physical circumstances known to insured, wherefore such means were not accidental within the meaning of the provision of the policy in question.

IX

Nothing was done, happened or occurred, except insured's resulting illness and death, that was not planned and foreseen by insured, wherefore his death did not result from any means that were both external and accidental.

X

While doing exactly what he intended to do, in the exact manner in which he intended to do it, insured simply exposed himself to the heat longer than his body could endure, wherefore if his death resulted from any external means, such external means were not accidental within the meaning of the provision of the policy in question.

XI

In so far as insured's death resulted from the causes alleged, it resulted from means voluntarily employed in a not unusual or unexpected way. In the acts or occurrences preceding the alleged injury, nothing unforeseen, unexpected or unusual occurred which produced it, wherefore the alleged injury did not result through accidental means.

Finlay & Campbell, Attorneys for Defendant.

[fol. 14] IN UNITED STATES DISTRICT COURT

MOTION IN NO. 1804 TO AMEND MOTION WITH RESPECT TO THIRD COUNT—FILED APRIL 18, 1931

Now comes defendant and moves for leave to amend its motion, heretofore filed and not yet disposed of, by adding at the end thereof the following:

"Defendant further moves that in event plaintiff is unable or for any other reason declines to make said allegations more specific in the respects above specified, an order be entered striking the said allegations constituting the second paragraph of said count."

Miller, Miller & Martin, Attorneys for Defendant.

MEMORANDUM IN SUPPORT OF MOTION

The foregoing motion to amend is based on admissions in plaintiff's brief recently filed (in opposition to the demurrer to the first, second and fourth counts) that the allegations in question are based not on any facts, but simply on a supposed inference from the occurrence of the sunstroke as alleged in the other counts. This is dealt with in defendant's reply to plaintiff's said brief, to which the Court is respectfully referred.

Miller, Miller & Martin, Attorneys for Defendant.

[fol. 15] IN UNITED STATES DISTRICT COURT

MOTION IN NO. 1805 TO AMEND MOTION WITH RESPECT TO THIRD COUNT—FILED APRIL 20, 1931

Now comes defendant and moves for leave to amend its motion, heretofore filed and not yet disposed of, by adding at the end thereof the following:

"Defendant further moves that in event plaintiff is unable or for any other reason declines to make said allegations more specific in the respects above specified, an order be entered striking the said allegations constituting the second paragraph of said count."

Finlay & Campbell, Attorneys for Defendant.

MEMORANDUM IN SUPPORT OF MOTION

The foregoing motion to amend is based on admissions in plaintiff's brief recently filed (in opposition to the demurrer to the first, second and fourth counts) that the allegations in question are based not on any facts, but simply on a supposed inference from the occurrence of the sunstroke as alleged in the other counts. This is dealt with in defendant's reply to plaintiff's said brief, to which the Court is respectfully referred.

Finlay & Campbell, Attorneys for Defendant.

[fol. 16] IN UNITED STATES DISTRICT COURT

ORDER OF CONSOLIDATION—Entered May 20, 1932

It appearing that the above entitled two cases involve the same or similar questions and that, in each of them, a demurrer to the first, second, and fourth counts, a motion to make the third count of the declaration more specific, and a motion to amend said motion has been filed, it is, on motion of plaintiff and by consent of all parties, ordered that said two causes be consolidated and proceed hereafter under the title "Florence Samuels Landress vs. Phenix Mutual Life Insurance Company No. 1804 at Law and Florence Samuels Landress vs. Travelers Insurance Company No. 1805 at Law—Consolidated Causes." The right, however, is reserved to any of the parties to have said causes segregated and tried separately if said demurrers shall hereafter be overruled either by this Court or on appeal.

Approved for entry.

George C. Taylor, Judge.

O. K.

W. L. Frierson, Miller, Miller & Martin, Finley & Campbell.

IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT—Entered May 20, 1932

These consolidated causes came on to be heard on the demurrers to the first, second and fourth counts of the

declaration and the motions to make the third count more specific and to amend said motions so as to move that the third count be stricken in the event plaintiff should fail to make said count more specific, said demurrers and motions having been filed in the above styled causes separately before the order of consolidation.

[fol. 17] And the Court, after considering briefs and hearing argument of counsel with reference to the issues so raised, orders and adjudges as follows:

(a) That said demurrers to the first, second and fourth counts be and they are hereby in all things sustained.

(b) That said motions to make the third count of the declarations more specific be and they are hereby sustained.

Thereupon plaintiff by her counsel admitted and agreed that she was unable to make the third count of the declarations more specific in the matter complained of by said motions with respect thereto, whereupon defendants' motions to amend their motions to make the declaration more specific, by moving to strike the third count, were duly allowed; and said motions to strike were by consent of all parties treated as demurrers to the third count, embracing all of the grounds of said demurrers to the first, second and fourth counts, and the Court, on due consideration thereof, in connection with plaintiff's said admission, orders that said demurrers be and they are hereby in all things sustained.

It is accordingly ordered that these suits be dismissed and that defendants respectively recover of plaintiff and the sureties on her cost bond, Williams & Frierson, all of the costs of the respective causes, for which execution may issue.

Approved for entry.

George C. Taylor, Judge.

Williams & Frierson, Attorneys for Plaintiff. Miller, Miller & Martin, Attorneys for Defendant. Finlay & Campbell, Attorneys for Defendant.

[fol. 18] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXCEPTION—Filed May 25, 1932

The plaintiff in each of the causes consolidated under the above title excepts to the action of the Court in sustaining demurrers to her declarations and dismissing her suits.

Williams & Frierson, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION—Filed April 23, 1932

This case is before me on defendant's demurrer to the First, Second and Fourth counts of the declaration, and motion to make more specific the allegations of the Third count or else to strike from said count the second paragraph thereof, that is, the portion of the Third count alleging that at the time the insured received the injury which resulted in his death there was unknown to him a temporary disorder or condition of his body, not amounting to physical infirmity within the meaning of the policy, which for the time being rendered him more than ordinarily sensitive to the heat of the sun; and that this temporary and unknown condition intervened between him intentional act of playing golf, which he intended and expected to perform safely, and which others did perform safely at the same time and place, and the injury which followed.

These allegations of this count of the declaration were intended to distinguish the case from that of Nickman v. New York Life Ins. Co., 39 Fed. (2nd) 763, and to bring it within the principle applied in the case of United States Mutual Assoc. v. Barry, 131 U. S. 100.

The case has been before me for a long time, and I have hoped all along to find time to review somewhat carefully the cases dealing with the questions presented, but it ap- [fol. 19] pears that to further delay the case is not justified by the possibility of having such later opportunity. It would seem the opportunity for full consideration and expression of opinion is constantly growing less by reason of increased trial work and pressing routine matters growing out of insolvency and receivership cases. I shall now

content myself with a brief statement of the matters involved, as I understand the case, with assurance to counsel that brevity of opinion is not evidence of lack of full consideration.

The suit is upon an insurance policy providing for double indemnity only in the event the assured's death was caused by bodily injuries, effected solely through external, violent and accidental means.

The only question presented is whether under the allegations of counts First, Second and Fourth the insured's death was under such circumstances as to create liability under the double indemnity provision. The material portions of the declarations are:

"First Count. He was accustomed to play and did play golf frequently in the afternoons during the summer months. On the afternoon of August 5, 1930, he was in his usual good health and not suffering from any disease or mental or physical infirmity, and was playing golf as he often did when the weather was such as it was on that day and as many others did without injury on the same afternoon and on the same golf links. But while so playing, he was suddenly and unexpectedly overcome by the force of the sun's rays upon his head and body and died within an hour or two.

"Second, third and fourth counts contain additional allegations as follows:

"Second Count. He was engaged in his accustomed recreation in which he and thousands of others constantly engaged in without injury even on hot days and the injury which followed was not the ordinary, natural or reasonably to be expected result of playing golf. Plaintiff's husband was playing golf unconscious of any danger from the heat of the sun, and the injury which resulted in his death was not one which followed in a not unusual or unexpected way from any intentional act on his part. It did not happen according to the usual course of things or as expected.

"Third Count. There was, unknown to him, a temporary [fol. 20] disorder or condition in his body, not amounting to a mental or physical infirmity within the meaning of the policy, which, for the time being rendered him more than ordinarily sensitive to the heat of the sun. This temporary

and unknown condition intervened between his intentional act in playing golf, which he intended and expected to perform safely and which others did perform safely at the same time and place, and the injury which resulted in his death.

"Fourth Count. Accidents do sometimes happen to those playing golf, but are not the usual and ordinary incidents of that game, and said policy does not exclude the risks incident to playing golf. It was only by chance that, on the day in question, plaintiff happened to be the one, out of many, playing with whom the rays of the sun came in contact in such a way as to cause injury."

It will be observed the declaration is carefully and skillfully drawn to bring it as nearly as may be, within the provisions of earlier decisions.

It is urged in support of the demurrer to these counts that sun stroke is a disease and not a bodily injury, due to violent and external means. In support of this contention there is respectable authority. I think the weight of authority is to the effect that as between the insurer and the insured the demurrer could not be sustained upon this ground; that sun stroke is not a disease. It is not necessary, however, to a decision to so hold.

The Third count of the declaration is attacked by a motion to make its allegations more specific. Under the conformity act attacks upon pleadings of this sort are to be tested by the State practice, and no case has been cited, and I have found none, dealing with the exact question. The alleged defect in the count is raised by this motion, and whether the motion is well taken or otherwise depends, I think, upon whether the allegation "at the time plaintiff's said husband received the injury which resulted in his death, there was, but unknown to him, a temporary disorder or condition of his body, not amounting to a mental or physical infirmity within the meaning of the policy, which for the time being rendered him more than ordinarily sensitive to the heat of the sun," brings to the defendant a sufficiently clear statement of the matter relied upon by plaintiff as basis of liability. It is urged, in effect, that every temporary disorder or condition short of mental [fol. 21] or physical infirmity is susceptible of particular description; that the language employed in the declaration

amounts only to a legal conclusion without any allegation of fact that would enable defendant to prepare to controvert the existence of the fact. The complained of portion of the count apparently undertakes, by elimination, to state a cause of action. The purport of the count is that the insured was playing golf under the same conditions, and at the same time many others were playing who were not injured; that he was not suffering from any physical or mental infirmity, as shown by the autopsy; that he was injured and therefore there must have been some condition other than physical infirmity which made the difference between the result in his case and the result in the case of all others playing at the same time who were not injured, and that he did not know of the existence of the condition. The motion attacks this pleading as withholding from the defendant that reasonable particularity of pleading required to enable it to make defense without incurring the labor and expense of preparing to meet the insured's claim that any one of perhaps several conditions existed to which he attributed the unusual result.

Counsel for the defense state that in event the motion to strike or make more specific is overruled a demurrer to the Third count will be filed just as to the others. Counsel for plaintiff admit that they are unable to make the allegations of fact more specific; that the condition which existed at the time is as unknown to them now as it was unknown to the insured.

Treating the motion to make more specific as sustained and treating the briefs filed in opposition to the motion as admitting inability to make the pleadings more specific, and treating then the motion to strike that portion of the count as a demurrer, the whole case, according to my view, may be disposed of in this memorandum, unless counsel should desire to make up the record by taking the usual steps hereinabove assumed.

I agree with the reasoning in the case of Hess v. Travelers Ins. Co., 299 Penn. 125, 149 Atlantic 96, repudiating the Fourth Circuit case of Mutual Life Ins. Co. v. Dodge, 11 Fed. (2nd) 486. I am of opinion this case correctly interprets the case of U. S. Mutual Assoc. v. Barry, 131 U. S. 100. I am of opinion further that the Sixth Circuit Court of Appeals in the cases of Nickman v. New York Life Ins. Co., 39 Fed. (2nd) 763, and Hope v. Prudential Ins.

[fol. 22] Co., 29 Fed. (2nd) 185, and the case of Maryland Casualty Co. v. Moosey, 38 Fed. (2nd) 724, has clearly settled the distinction between unexpected, unusual or accidental result and accidental means or causes leading to a given result.

If as to the Third count of the declaration it may be said that there was existing within the insured's body and unknown to him some disorder or condition short of mental or physical infirmity which caused the rays of the sun or the applied heat to produce a different result from that in the case of others, under otherwise identical conditions, such condition was not accidental because unknown. It was a means, in that view, neither accidental, external nor violent. The Barry case has no such import. The means or cause leading to the result determine the question of liability. That the result was unexpected, unusual or unintended creates no basis for conclusion that a means or cause thereof was accidental, even is unknown. Hypersusceptibility or more than usual sensitiveness to an external application of force is not accidental means.

The demurrer to all of the counts is sustained.

George C. Taylor, Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed June 15, 1932

Florence Samuels Landress, the plaintiff in the two suits consolidated under the above title, prays an appeal from the judgment entered in said consolidated causes sustaining a demurrer to her declaration in each of the consolidated causes, and dismissing her suits entered in the above consolidated causes on the 20th day of May, 1932, to the United States Circuit Court of Appeals for the Sixth Circuit for the reasons specified in the assignment of errors, which is filed herewith.

Williams & Frierson, Attorneys for Petitioner.

[fol. 23] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed June 15, 1932

The plaintiff in each of the above causes, as grounds for her appeal from the judgment sustaining demurrers to her declarations, assigns as error the following:

I

All four of the counts in each declaration alleged that insured, "while in his usual good health and not suffering from any disease or any mental or physical infirmity" and while playing golf in the afternoon of August 5th, 1930 "as he often did when the weather was such as it was on that day, and as many others did without injury on that afternoon and on the same golf links," "was suddenly and unexpectedly overcome by the force of the sun's rays upon his head and body and died within an hour or two."

This stated a case within the terms of the policy sued on in the first of the above causes which provided for payment if the insured's death resulted "directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental causes, and not directly or indirectly, wholly or partly from disease or physical or mental infirmity," and also within the terms of the policy sued on in the second of the above causes which provided for payment if insured's death should result "from bodily injuries effected directly and independently of all other causes, through external, violent and accidental means."

II

The second count in each declaration, in addition to the allegations mentioned above, alleged that insured "was engaging in his accustomed recreation in which he and thousands of others constantly engaged without injury even on hot days, and the injury which followed was not the ordinary, natural, or reasonably to be expected result of playing golf"; that insured was playing, "unconscious of any danger from the heat or the sun, and the injury which followed was not one which followed in a not unusual or unexpected way from an intentional act of his"; and that "did not happen according to the usual course of things or as expected." And thus a case within the terms of both policies was stated.

[fol. 24] III

The third count in each declaration repeated the allegations of the first count and added that, unknown to the insured, there was a "temporary disorder or condition in his body, not amounting to a mental or physical infirmity

within the meaning of the polic-es, which for the time being rendered him more than ordinarily sensitive to the heat of the sun"; that "this temporary and unknown condition intervened between his intentional act in playing golf, which he intended and expected to perform safely and which others did perform safely at the same time and place, and the injury which followed."

This stated a case within the terms of the policies sued on.

IV

The fourth count repeated the allegations of the first count and added that:

"Accidents do sometimes happen to those playing golf, but are not the usual and ordinary incident of that game"; that the terms of the policies sued on "do not exclude the risks incident to playing golf"; that "it was only by chance that on the day in question plaintiff's husband happened to be the one out of the many playing with whom the rays of the sun came in contact in such a way as to cause injury."

This stated a case within the terms of the policies sued on.

Williams & Frierson, Attorneys for Plaintiff.

[fol. 25] IN UNITED STATES DISTRICT COURT

ORDER GRANTING APPEAL—Filed June 17, 1932

The petition of the plaintiff in the above titled consolidated causes for an appeal from the final judgment is hereby granted and appeal is allowed.

George C. Taylor, Judge.

Citation, in usual form, showing service on Vaughn Miller and J. F. Finlay, filed June 22, 1932, omitted in printing.

[fol. 26] Clerk's certificate to foregoing transcript omitted in printing.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

(May 11, 1933—Before: MOORMAN, HICKS and SIMONS, JJ.)

This cause is argued by W. L. Frierson for Appellant and by Vaughn Miller and J. F. Finlay for Appellees and is submitted to the Court.

JUDGMENT

(Filed June 6, 1933)

Appeal from the District Court of the United States for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

OPINION

(Filed June 6, 1933)

Before MOORMAN, HICKS and SIMONS, Circuit Judges.

HICKS, Circuit Judge. Florence Samuels Landress, widow of Thomas L. Landress, brought separate suits against appellees, Phoenix Mutual Life Insurance Company and Travelers Insurance Company. That against the Phoenix Company was upon two similar insurance policies which provide double indemnity only in the event that insured's death resulted "directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental causes;. . . ." The Phoenix Company contested double liability. The suit against the Travelers Company was upon a single policy which provided for insurance against loss resulting only from "bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means . . ."

The declarations in both cases are similar and embrace four counts. The principal averments upon which appellant relies are contained in the first and third counts. The second and fourth vary in expression but do not differ so materially from the first as to require or justify separate consideration. The third paragraph of the first counts alleges that,—

> "The death of plaintiff's said husband occurred under the following circumstances. He was accustomed to play and did frequently play golf in the afternoon during the summer months. On the afternoon of August 5, 1930, he was in his usual good health and not suffering from any disease or any mental or physical infirmity, and was playing golf as he often did when the weather was such as it was on that day, and as many others did without injury on the afternoon and on the same golf links. But while so playing, he was suddenly and unexpectedly overcome by the force of the sun's rays upon his head and body and died within an hour or two."

And the third counts after adopting the first, second and third paragraphs of the first counts, contains the following additional averments,—

"At the time plaintiff's said husband received the injury which resulted in his death, there was, but unknown to him, a temporary disorder or condition in his body, not amounting to a mental or physical infirmity within the meaning of the policies, which for the time being rendered him more than ordinarily sensitive to the heat of the sun. This temporary and unknown condition intervened between his intentional act in playing golf, which he intended and expected to perform safely and which others did perform safely at the same time and place, and the injury which followed."

The cases were consolidated in the District Court. Appellees demurred to all the counts in each declaration except the third and moved to make the third more specific, or, in the alternative, to strike the second paragraphs thereof. These motions to make the third counts more specific were sustained. Thereupon appellant announced that she was unable to comply with the order and by consent the motions to strike were treated as demurrers embracing all the grounds of demurrer to the first, second and fourth counts. The demurrers of each defendant are similar and each contains eleven grounds. Both were sustained by the court. The essence of the one as to the Phoenix policy was that the declaration showed upon its face that the insured's death did not result "directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental causes;" and as to the Travelers policy that the declaration showed upon its face that the insured's death did not result "from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means, . . ."

Upon the averments of the first, second and fourth counts of the declarations we think it is clear that the case must be ruled by *Nickman* v. *New York Life Ins. Co.*, 39 Fed. (2) 763 (C. C. A. 6). These counts disclose that the operating cause of insured's death was his voluntary exposure to the heat of the sun while playing golf. The high temperature was natural and not accidental and it is not alleged that the insured's acts and conduct upon the golf course were other than what he intended.

The averments of the third counts present the cases in a somewhat different aspect.

As to the Phoenix policies the averment was that the "accidental cause" of death was the unknown, temporary condition of the insured's body which rendered it supersensitive to the heat of the sun. As to the Travelers policy it was similar except reference was made to the "accidental means" by which death was effected rather than the accidental cause of death. The averments were similar as to all three policies that this condition was an external and violent cause or means of death; but there was no allegation that the insured's idiosyncrasy was accidental or that it was produced by other than a natural cause. It is stated that the insured's peculiar physical condition intervened between his act in playing golf and the injury which followed, but this is not sufficient. These third counts of the declarations wholly fail to allege, and we think could not consistently aver, that the insured's temporary disorder was a mischance, "slip or misstep" in the acts or conduct of insured while playing golf in a high temperature. Conceding that the disorder was a mishap it did not in any way alter or interfere with the insured's voluntary course of conduct while playing. It was simply a condition and if it had not existed we must assume that the insured would not have died; but it was not the accidental operating cause of his death nor the accidental means which brought it about.

We think the case must be controlled by *Mutual Accident Assn.* v. *Barry*, 131 U. S. 100, as interpreted and construed by *Maryland Casualty Co.* v. *Massey*, 38 Fed. (2) 724, 725 (C. C. A. 6) and *Pope* v. *Prudential Ins. Co.*, 29 Fed. (2) 185, 187 (C. C. A. 6); see also *Nickman* v. *New York Life Ins. Co., supra; Order of United Commercial Travelers of America* v. *Shane*, 64 Fed. (2) 55, 59 (C. C. A. 8).

Some of the cases which adopt a contrary view have been considered and analyzed in the Massey, Pope and Nickman cases herein cited. A further discussion of them could add nothing of value.

Finally, if we could construe the third counts of the declarations as averring that the hyper-susceptibility of the insured's body to excessive temperature was the accidental cause of his death, we are still confronted with the proposition that such was not the independent cause of death or independent means through which it was effected. *Hesse* v. *Travelers Ins. Co.*, 299 Penna. St. 125,

129. Nor was it a violent and external cause or means in the sense of the indemnity provisions of the policies. See *Order of United Commercial Travelers* v. *Shane, supra.*

Affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

I, J. W. MENZIES, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *Florence Samuels Landress* v. *Phoenix Mutual Life Insurance Company and Travelers Insurance Company* No. 6238, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 24th day of June, A. D. 1933.

J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(SEAL)

[fol. 32] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,898. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 295. Florence Samuels Landress, petitioner, vs. Phœnix Mutual Life Insurance Company and Travelers Insurance Company. Petition for a writ of certiorari and exhibit thereto. Filed July 28, 1933. File No. 295, O. T., 1933.

(4173)